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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD EDWARD ATKINSON,

Defendant and Appellant.

F068101

(Super. Ct. No. F12907354)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Chung Mi Choi, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P. J., Detjen, J. and Franson, J.

INTRODUCTION

A jury found appellant Richard Edward Atkinson guilty of aggravated mayhem. (Pen. Code, § 205.)¹ The jury also found true an allegation supporting a gang enhancement. (§ 186.22, subd. (b)(1).) In addition, appellant admitted an enhancement allegation for two prior prison terms. (§ 667.5, subd. (b).)

Appellant was sentenced to state prison for a term of life with the possibility of parole for the charge of aggravated mayhem, plus 10 years for the gang enhancement, and two one-year terms for the prior prison term enhancement.

On appeal, appellant asserts there is insufficient evidence to support the jury's finding that he committed aggravated mayhem for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1). We disagree and affirm the judgment.

FACTS

Prosecution Case

On August 30, 2010, James S. went to the One Star Mart convenience store where he saw appellant, an acquaintance he had known since childhood. Appellant is a member of the North Side Bulldog gang. James S. acted as a confidential informant on three or four occasions by providing law enforcement with information about narcotics purchases.

James S. asked appellant for a ride. Appellant agreed, but explained that first he had to pick up his brother, Gabriel Rodriguez. Rodriguez met appellant at the convenience store, and the three men left in appellant's vehicle. After an unspecified period of time, appellant stopped the vehicle on a dirt road in an area surrounded by vineyards. Appellant and Rodriguez exited the vehicle and told James S. to get out of the

¹ All undesignated statutory references are to the Penal Code unless otherwise indicated.

car. As James S. exited the vehicle, he observed that both men were holding knives with five- to six-inch-long blades. Rodriguez told James S. to get on his knees. James S. complied and appellant stood behind him, holding his shoulder down while Rodriguez put his knife in appellant's mouth.

With his knife in James S.'s mouth, Rodriguez told James S., "snitches get stitches," and sliced him from the right side of his mouth to his right ear. Rodriguez pulled James S.'s chain from his neck, and appellant took James S.'s watch and backpack. As appellant and Rodriguez began walking back toward the vehicle, Rodriguez told appellant something and appellant turned around and walked back toward James S.

Appellant stabbed James S. nine times, causing injury to his face, lungs, liver, kidney, diaphragm, stomach, and intestines. Appellant and Rodriguez drove away, leaving James S. James S. eventually stood up and walked a quarter of a mile to a house, where he collapsed. The homeowner called police. As a result of his wounds, James S. sustained internal bleeding, underwent multiple surgeries, had to be hooked up to a breathing apparatus, and was hospitalized for approximately two months. He also sustained multiple permanent scars, including a three- to four-inch scar across his face.

At trial, Detective Andrew Simonson from the Fresno County Sheriff's Department testified as a gang expert specializing in the Bulldogs and Sureño gangs. Simonson testified that appellant is a member of the Bulldogs, a criminal street gang. Simonson based his opinion on seven jail classifications² in which appellant admitted his gang membership, numerous Bulldog gang-related tattoos, contacts appellant admitted his gang membership to, and a prior conviction for a crime commonly associated with gang membership.

² Jail classifications are questionnaires given to inmates to assist jail staff with housing inmates.

Simonson testified that Rodriguez was in a unique situation with respect to his gang membership status. Although he was segregated from the Bulldogs gang population while in jail and he had allegedly dropped out of the gang in 2004, his activities outside of jail were consistent with active gang membership. In 2009, Rodriguez self-admitted to being a member of the Bulldogs, he was stopped on two separate occasions wearing red Fresno State clothing, which symbolizes the Bulldogs gang, and his girlfriend told police he was a gang member.

Simonson also testified that the attack on James S. was gang-related. He explained that the statement, “snitches get stitches,” is common in gang culture and that disfiguration of a victim’s face, a “punto [*sic*] mark,”³ is inflicted so that the wound and resulting scar allow others to identify the victim as a coward or traitor to the gang. In his opinion, James S.’s wounds were a common form of gang retaliation against snitches, who are considered the lowest form of life within gangs.

Simonson indicated that the willingness to commit violent crimes would further the interest of a criminal street gang and strengthen a gang member’s reputation. In response to a hypothetical based on the facts of the instant case, Simonson opined that appellant and Rodriguez were acting for the benefit of a criminal street gang. There is an obligation of gang members to eliminate all threats to the organization, and appellant and Rodriguez assisted each other in attacking a perceived confidential informant and proceeded to leave the scene of the crime together, suggesting that they were acting together in the commission of the crime.

³ The record refers to the mark as a “punto mark,” rather than a “puto mark.”

Defense Case

Appellant testified in his own defense. He admitted to being a Bulldog gang member. He claimed that on August 30, 2010, he gave James S. and his brother a ride. Appellant testified that he pulled over and let Rodriguez drive because he was falling asleep. Rodriguez later pulled the vehicle over to get high. Appellant left the vehicle after Rodriguez woke him up, telling him to run from the police. He denied that he planned to or actually harmed James S.

DISCUSSION

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Koua Xiong* (2013) 215 Cal.App.4th 1259, 1268.) Substantial evidence is evidence which is “reasonable, credible, and of solid value.” (*People v. Johnson, supra*, 26 Cal.3d at p. 578.) In reviewing a record for substantial evidence, an appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367).

An appellate court can only reject evidence accepted by the trier of fact when the evidence is inherently improbable and impossible of belief. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Marshall* (1997) 15 Cal.4th 1, 34.)

Appellant does not dispute that he is an active member of the Bulldogs, a criminal street gang.⁴ Rather, he contends Simonson’s testimony was not coupled with other evidence from which the jury could have reasonably concluded the offense was committed for the benefit of a criminal street gang with the specific intent to promote, further, or assist the criminal conduct of gang members. We disagree.

Section 186.22, subdivision (b)(1) requires a two-part showing. The prosecution must establish the underlying felony was (1) “committed for the benefit of, at the direction of, or in association with any criminal street gang, [(2)] with the specific intent to promote, further, or assist in any criminal conduct by gang members.” If the underlying felony is a violent felony, the defendant “shall be punished by an additional term of 10 years.” (§ 186.22, subd. (b)(1)(C).) A violent felony includes any felony punishable by life in state prison. (§ 667.5, subd. (c)(6).) Appellant was convicted of aggravated mayhem, intentionally causing permanent disability or disfigurement of another, a felony punishable by life imprisonment. (§ 205.)

Appellant correctly asserts that a gang expert’s testimony alone is insufficient to find that an offense is gang-related. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) “[T]he record must provide some evidentiary support, other than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, italics in original.)

In *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*), our Supreme Court upheld a section 186.22, subdivision (b)(1) gang enhancement. In *Albillar*, the defendants, three

⁴ We note our Supreme Court’s recent decision, *People v. Elizalde* (2015) 61 Cal.4th 523, which limits the use of jail classifications to prove gang membership under certain conditions. However, appellant does not challenge his gang membership status. Further, no supplemental briefing was filed raising this issue.

gang members who were related to each other, sexually assaulted the victim inside an apartment. (*Albillar, supra*, 51 Cal.4th at p. 51.) There was no gang graffiti left in the apartment and no throwing of gang signs. (*Id.* at pp. 51-53.)

Nonetheless, the court concluded the evidence was sufficient to support a finding that the crimes met the first prong of section 186.22, subdivision (b)(1) because they were committed in association with a gang, reasoning, “[d]efendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other’s cooperation in committing these crimes and that they would benefit from committing them together.” (*Albillar, supra*, 51 Cal.4th at pp. 61-62.) By committing crimes together, gang members increase their status among those participating in the crimes and among the entire gang. (*Id.* at p. 61.)

Here, the jury could reasonably infer that appellant stabbed James S. for the benefit of, as well as in association with, the Bulldogs street gang. Simonson testified that respect is paramount among gangs, and the willingness to commit violent crimes furthers the interests of a gang. (*Albillar, supra*, 51 Cal.4th at p. 63 [“Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’”].) Appellant’s attack on James S. was unquestionably vicious; James S. was stabbed nine times, puncturing his face, lungs, liver, kidney, diaphragm, stomach, and intestines; his wounds required multiple corrective surgeries over the course of his two month hospital stay.

Simonson also testified that an attack on a confidential informant, such as the one committed by appellant and Rodriguez, would benefit a criminal street gang because there is an obligation of gang members to eliminate all threats to the organization. Simonson explained that Rodriguez’s statement, “snitches get stitches,” is common in gang culture, and that disfiguration of a victim’s face is inflicted so that the wound and resulting scar will allow others to identify the victim as a coward or traitor to the gang.

In his opinion, James S.'s wounds were consistent with a form of gang retaliation against snitches, who are considered the lowest form of life within gangs. Thus, the record supports the conclusion that appellant acted to benefit the Bulldogs by retaliating against a perceived threat to the organization, a confidential informant.

The record also supports the finding that the act was committed in association with a criminal street gang, because Rodriguez was appellant's associate in the commission of the attack. In 2009, Rodriguez self-admitted to being a member of the Bulldogs gang, he was stopped on two separate occasions wearing gang-related clothing, and his girlfriend told police he was a gang member. The jury could reasonably conclude Rodriguez was an active gang member.

As Simonson testified, the evidence suggests appellant and Rodriguez acted together in attacking a confidential informant, a potential threat to the Bulldogs. Appellant held James S.'s shoulder down while Rodriguez cut James S.'s face, appellant then stabbed James S. repeatedly, and the men left together. Similar to *Alibillar*, where the court ruled the defendant gang members committed crimes in association with a gang by committing the crimes at issue together, appellant's attack on James S. was committed in association with a gang because the men acted together in attacking appellant, a potential threat to their gang organization.

We find sufficient evidence was presented to support the jury's finding that appellant committed the attack on James S. for the benefit of and in association with the Bulldogs criminal street gang. We now turn to the issue of whether appellant acted with the specific intent to promote a criminal street gang under the second prong of section 186.22, subdivision (b)(1).

In re Frank S. (2006) 141 Cal.App.4th 1192, 1195 (*Frank S.*), after a police officer stopped a minor for riding a bicycle through a red light, the officer discovered a concealed, fixed blade knife. The minor said he had recently been attacked and "needed the knife for protection against 'the Southerners' because they feel he supports northern

street gangs.” (*Ibid.*) At trial, when the prosecutor asked the gang expert for “her opinion of the minor’s purpose for the knife, the expert stated the minor possessed the knife to protect himself.” (*Ibid.*) The expert also indicated that “a gang member would use the knife for protection from rival gang members and to assault rival gangs” and “the minor’s possession of the knife benefited the Norteños” because “it helps provide them protection should they be assaulted.” (*Id.* at pp. 1195-1196.)

On appeal, the appellant claimed the evidence was insufficient to support the gang enhancement allegation (§ 186.22, subd. (b)(1)) attached to his crime of possession of a dirk or dagger. (*Frank S., supra*, 141 Cal.App.4th at pp. 1194-1195.) This court agreed that there was insufficient evidence to show that minor “had a specific intent to promote, further, or assist in any criminal conduct by gang members.” (*Id.* at p. 1196.) We reasoned that other than the expert’s improper opinion on the ultimate issue, no other evidence was presented to establish that possession of the weapon was “‘committed for the benefit of, at the direction of, or in association with any criminal street gang’” (*Id.* at p. 1199.)

In *People v. Gardeley* (1996) 14 Cal.4th 605, 610-611 (*Gardeley*), the defendant and two other men attacked and robbed a man outside of an apartment complex. The defendant was charged with a gang enhancement pursuant to 186.22, subdivision (b)(1). (*Id.* at p. 611.) A gang expert testified that the primary activity of the Family Crip gang was the sale of narcotics but that the gang also engaged in witness intimidation, and that the attack on the victim was “a ‘classic’ example of how a gang uses violence to secure its drug-dealing stronghold.” (*Id.* at 612-613.)

The expert based his testimony on conversations with gang members, a personal investigation of crimes committed by gang members and information from his colleagues and various law enforcement agencies. (*Gardeley, supra*, 14 Cal.4th. at p. 612.) Our Supreme Court concluded the expert’s testimony was sufficient for the jury to find that the attack was committed “for the benefit of, at the direction of, or in association with”

that gang, and ““with the specific intent to promote, further, or assist in ... criminal conduct by gang members”” (*Id.* at p. 619.)

This case is distinguishable from *Frank S.* and analogous to *Gradeley*. Here, unlike in *Frank S.*, Simonson’s testimony was not the only evidence presented by the prosecution. Similar to *Gradeley*, Simonson based his opinion on evidence in the record, including, the offense committed, statements made to the victim, and the disfiguration of the victim’s face.

Appellant was convicted of aggravated mayhem, a charge enumerated within the list of serious crimes seen or found to be related to gangs pursuant to section 186.22, subdivision (e). In addition, as previously set forth, the statement made during the attack on James S. that “snitches get stitches,” as well as the injuries inflicted upon James S., a mark commonly inflicted upon traitors to the gang for identification purposes as well as multiple stab wounds, point convincingly to the conclusion that appellant acted with the specific intent to promote, further, or assist the Bulldogs criminal street gang by retaliating against a confidential informant.

We find that substantial evidence supports the jury’s finding that appellant acted for the benefit of the Bulldogs criminal street gang with the specific intent to promote, further, or assist the criminal conduct of gang members.

DISPOSITION

The judgment is affirmed.